91-772

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY PRINSKI,
Petitioner,

v.

TERMAR NAVIGATION CO., INC. and
VAN OMMEREN SHIPPING B.V.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

1. In a suit for damages by a longshoreman under Section 5(b) of the Longshore and Harbor Workers' Compensation Act, does the shipowner's duty of care extend to unsafe conditions existing on cargo which is being used as a walkway for access to and from the cargo on which the longshoreman is working?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Gary Prinski, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered August 12, 1991, affirming the granting of Summary Judgment in favor of respondents in the within proceeding, and in support thereof represents as follows:

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming the decision of the United States District Court for the Eastern District of Pennsylvania is not yet officially reported, and is reproduced in the appendix hereto at page 9a.

The Opinion of the United States District Court for the Eastern District of Pennsylvania is not yet officially reported, and is reproduced in the appendix hereto at page 1a.

The Order Amending Opinion of the United States District Court for the Eastern District of Pennsylvania is not yet officially reported, and is reproduced in the appendix hereto at page 7a.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on August 12, 1991 (9a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b).

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in

providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided by this subsection shall be exclusive of all other remedies against the vessel except remedies avail able under this chapter.

LEGISLATIVE HISTORY INVOLVED

The legislative history of the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act appears in House Report No. 92-1441, and is reprinted in 1972 U.S. Code Cong. & Adm. News, Vol. 3, beginning at page 4698. The portion relating to the elimination of the unseaworthiness remedy begins a page 4701 and is reproduced in the appendix hereto beginning at page 16a.

STATEMENT OF THE CASE

This is an action to recover damages for personal injuries suffered by petitioner, Gary Prinski, while working as a longshoreman. To facilitate the resolution of the legal issues presented by the case, the parties entered into a Stipulation (11a) which, for purposes of a Motion for Summary Judgment, sets forth the facts which the parties agreed there would be evidence to support. On the basis on this Stipulation, the respondents filed a Motion for Summary Judgment which was granted by the District Court (1a, 6a) and subsequently affirmed by Judgment Order by the Court of Appeals for Third Circuit (9a). The instant petition seeks review of the Third Circuit's affirmance of the decision of the District Court.

For purposes of the Motion for Summary Judgment, the Stipulation established the following facts.

On January 15, 1988, petitioner was employed as a longshoreman by Holt Cargo Systems, Inc. (hereafter "Holt"), a stevedore with terminal facilities located in Gloucester, New Jersey. On that day, Holt had been hired to discharge a cargo of steel products from the M/V SERAFIN TOPIC, a cargo ship which, at the time, was owned by respondent, Termar Navigation Co., Inc., and under time charter to respondent, Van Ommeren Shipping B.V. (11a).

Petitioner was injured when, while walking across pipe that was stowed in the No. 2 hold of the ship, he slipped and fell on ice that had formed on the pipe (13a-14a). The circumstances leading to the accident to petitioner were as follows.

Petitioner was working in a longshoreman gang which was assigned to discharge a cargo of steel products which was located in the No. 2 hold of the ship (11a). The cargo of steel products had been loaded aboard the ship at two ports in the Netherlands in December of 1987 (11a-12a). Following the loading of the cargo, the ship sailed for the United States where its first port for discharging cargo was Bridgeport, Connecticut. At Bridgeport, some cargo was discharged from the No. 2 hold of the ship (as well as from other holds) on January 12 and 13 of 1988. The vessel then sailed for Gloucester, New Jersey, arriving at Holt shortly before midnight on January 14, 1988. Cargo operations at Holt began at 8:00 A.M. on the morning of January 15, 1988 (12a).

At the time of the vessel's arrival at Holt, the *forward* half of the No. 2 hold was stowed with steel coils which were to be discharged at Holt. The *after* half of the No. 2 hold was stowed with structural steel beams which were to be discharged at Wilmington, North Carolina, the vessel's

next port. In addition, on top of these structural steel beams in the *after* end of the hold, there were two layers of steel pipe which also were to be discharged at Holt. This pipe was stowed in a fore and aft direction with single and double pieces of approximately 1 inch thick dunnage board placed between each tier of pipe. Also of relevance is that, at the time the steel had been loaded in the hold of the ship in the Netherlands, and prior to the vessel's arrival in Bridgeport, there had been a considerable amount of other cargo stowed on top of the pipe that was in the after end of the No. 2 hold. However, this cargo had been discharged at Bridgeport, and, as a result, the pipe then became the top of the stow at the after end of the hold (12a-13a).

In discharging the cargo in the No. 2 hold, the longshoremen started with the steel coils that were located in the *forward* end of the No. 2 hold. Three longshoremen, including petitioner, worked in the hold in connection with this discharging operation. They entered the No. 2 hold by means of a permanent fixed ladder located at the *after* end of the hold, and then had to walk *across* the pipe that now formed the top of the stow at the after end of the hold until they reached the steel coils that were stowed in the forward end of the hold. In leaving the hold, they had to retrace their steps by walking across the pipe from the forward end of the hold to the ladder located at the after end of the hold. Thus, for this purpose, the pipe stowed in the after end of the hold became the walking surface or floor over which they had to walk in order to go to and from the cargo they were discharging.

Petitioner was injured shortly after 3:00 P.M. on January 15, 1988. At that time he was walking across the pipe that was in the after end of the hold in order to reach the ladder to exit the hold. As he was walking across the pipe towards the ladder, he slipped and fell on a strip of very thin ice which extended across the pipe. This strip of ice, which extended across 10 to 12 adjacent pipes, was approximately 1 inch wide. Petitioner testified at his deposition, and photographs subsequently demonstrated, that this

strip of ice was thin and could be seen if one were looking for it but would not be readily apparent to one walking across the pipe if one did not know to look for it (13a-14a).[1]

The presence of such a strip of ice on a cargo in the hold of a vessel was an unusual condition. The origin of its configuration -- the strip of ice was in a relatively neat straight line across a cargo of separate pieces of pipe -- was difficult to explain. The only explanation that could be offered with respect to the source of this strip of ice was the opinion of an expert retained by petitioner who suggested that it might have come about as a result of water being squeezed from a piece of wet dunnage that had been on top of the pipe prior to the discharge in Bridgeport of the cargo that was on top of the pipe. The weight of the cargo which had been stowed on top of the pipe would have been sufficient to squeeze any water or other moisture out of the piece of wood dunnage had it been wet, or had it been the type of wood that contained considerable moisture, and that after the water had been squeezed from the dunnage, it froze creating a strip of ice in a straight line across the pipe the approximate width of the dunnage board from which it had been squeezed (14a-15a). This opinion was supported by entries in the vessel's log book which disclosed that while temperatures which the vessel encountered during its Atlantic crossing until January 6, 1988, were above freezing, the air temperatures fell to below freezing through the time the vessel was at Bridgeport and during the coastwise trip from Bridgeport down to Holt and during the time the vessel was at Holt (12a). In any event, the parties have agreed that the opinion of petitioner's expert is the only plausible explana-

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1. The District Court, in its original opinion, initially described this strip of ice as being one inch "thick" (1a). This was not correct; rather, the strip was quite thin and barely visible. In this respect, it was not an open and obvious condition. This error was called to the Court's attention and the Court amended tits opinion to reflect that the strip of ice was one inch "wide" (7a)

tion for the presence of the strip of ice which caused petitioner's fall and, the parties also agreed that the strip of ice was present on the pipe at the time work began in the No. 2 hold at 8:00 A.M. on the morning of January 15, 1988 (14a-15a). Thus, the case presents a factual situation in which ice developed on stowed cargo which, at the time of the accident, was serving as a walking surface over which longshoremen had to walk in the performance of their duties.

In granting summary judgment, the District Court, relying on the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 839 F.2d 490 (3rd Cir. 1987), *cert. den'd.*, 486 U.S. 1007 (1988), held that a shipowner had no duty to inspect for unsafe conditions existing on cargo (4a), and, in the absence of proof of actual knowledge of the condition, had no duty to warn of an unsafe condition which might be present on cargo (5a).

REASONS WHY THE WRIT SHOULD BE GRANTED

1. **The decision below, which is based on the decision in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988), is in conflict with the decisions of the Court of Appeals for the Fifth Circuit, in *Woods v. Sammisa Co., Ltd. and Sammiline Co., Ltd., et al*, 873 F.2d 842 (5th Cir.), *petition for rehearing and for rehearing in banc denied*, 878 F.2d 1435 (5th Cir. 1989), *cert. denied*, 107 L.Ed.2d 847 (1990), *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), and *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), and the decision of the Court of Appeals for the Ninth Circuit in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, *cert. denied*, 459 U.S. 967 (1982), all of which hold that the shipowner's duty of care extends to unsafe conditions existing in a cargo stow.**

In the Legislative History accompanying the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act, Congress set forth an example of the type of condition for which a shipowner would be liable. Significantly, that Legislative History refers to a slip and fall accident, similar to the accident in the instant case with the only difference being that the slippery substance in the hypothetical case set forth in the Legislative History is oil, rather than ice. The Legislative History states (20a):

> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) *the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under*

> *the circumstances*. The vessel will not be chargeable with negligence of the stevedore or employees of the stevedore. (Emphasis supplied)

The second part of the foregoing example establishes the duty of a shipowner to correct unsafe conditions which would be discoverable by a reasonable inspection. Liability does not depend upon the shipowner having "actual" knowledge of the condition, but, rather, requires only that the condition exist for a sufficient period of time to have been "discovered" and "removed" by the vessel in the exercise of reasonable care.

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), this Court elaborated on the shipowner's duty of inspection by distinguishing between conditions which were in existence *prior* to the start of cargo operations, and those which came into existence *after* the start of cargo operations. This Court held that, as to conditions arising *after* the start of cargo operations, the shipowner was under no continuing duty of inspection to discover such conditions. However, the shipowner did have a duty to inspect and discover conditions existing *prior* to the start of cargo operations and, as to such conditions, would be "charged with knowledge of the condition", see 451 U.S. at 168, and would "be deemed to have been aware" of the condition, see 451 U.S. at 176.

It is thus clear, on the authority of the Legislative History and *Scindia*, that if the strip of ice which caused petitioner to slip and fall in the instant case had been on the deck or other walkway of the vessel, he clearly would have a viable claim of negligence against the vessel. In the instant case, however, the District Court relying on the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988), nonetheless held that the plaintiff could not recover because the slippery condition happened to be located on cargo (even though this cargo was, in fact, being used as a walkway). In so holding, the District Court recognized that

there was a significant factual distinction between the instant case and *Derr* in that the presence of the ice on the cargo in the instant case could not be attributed to negligence of either the loading or the discharging stevedores. Indeed, since the freezing temperatures which caused the formation of the ice did not occur until a few days prior to the accident, the unsafe condition did not exist, and, therefore, was not capable of being discovered, at the time the cargo was loaded. In this sense, the instant case is distinguishable from *Derr* in that *Derr* involved a claim of negligence in the faulty securing of cargo at the time the cargo was loaded -- a condition which could have been discovered and cured at the time the cargo was loaded.

Notwithstanding the obvious factual distinction between the instant case and *Derr*, the District Court, in granting Summary Judgment, gave an expanded interpretation to *Derr* by interpreting *Derr* as holding that the shipowner *never* had a duty to inspect the condition of cargo (4a) and, therefore, could not be held responsible for an unsafe condition existing on cargo even if the unsafe condition was *not* caused by faulty stowage of the cargo.

In adopting this expanded interpretation of *Derr*, the Court below relied on the contention, first made in *Derr*, that it would be unreasonable to require a shipowner to inspect cargo conditions at each port that the vessel loads or discharges cargo (4a). This contention is contrary to both maritime practice and common sense.

There is nothing unreasonable in requiring a shipowner to inspect the condition of cargo at intermediary ports where a vessel stops to discharge cargo, any more than it is unreasonable to expect that a shipowner will inspect the condition of a vessel's decks and gear and equipment at each intermediary port. If a shipowner has to inspect the condition of a vessel's decks to remove slippery conditions at each intermediary port at which the vessel stops, why should there be any difference with respect to the condition of cargo? Particularly, where, as here the condition involved is not

one which was created by a loading stevedore, but, rather, was one which developed during the course of the voyage, if injury to longshoremen is to be prevented, then the shipowner is the only one in a position to take the steps necessary to prevent or remove the condition. The 1972 Amendments to the Longshore and Harbor Workers Compensation Act, in relieving the shipowner from liability for unseaworthiness, did not also relieve the shipowner from liability for negligence. Negligence implies a duty of reasonable inspection. The fact that an inspection may have to be made more than once during the course of a voyage does not make it unreasonable.

The District Court in the instant case, again relying on *Derr* as authority, also held that the shipowner's duty of reasonable care extended only to the "work space" of the vessel and "work space" did not include "stowed cargo" (5a). This holding, however, overlooks the fact that at the time petitioner was injured, the pipe on which he was walking was not being discharged and was not directly involved in the cargo operations; rather, it was the walkway by which petitioner was gaining access to the cargo which he was discharging. From petitioner's standpoint, at the time of the accident, this cargo was as much a part of the work space of the vessel as was the deck of the vessel insofar as it was his means of gaining access to and from the cargo on which he was working. If that pipe had not been in the after end of the hold, then petitioner would have been walking across the deck of the vessel, and if that same strip of ice had been on the deck of the vessel, then it is clear that the shipowner's duty would have extended to discovering and removing it.

To distinguish between the shipowner's duty with respect to the condition of a deck over which longshoremen must walk to reach the area where they have to work and cargo over which they have to walk to reach that same area is both artificial and illogical. Is a shipowner to be permitted to escape its responsibility for providing a safe means of ingress and egress to the work area by placing cargo on top

of the normal means of ingress and egress and then have no responsibility for the condition of that cargo?

The problem in the instant case ultimately arises from the *Derr* decision, -- a decision which repeatedly has been recognized as being in conflict with decisions from other circuits.[2] Just how illogical and irrational are the decisions being made in the Third Circuit on the basis of the *Derr* decision becomes apparent when one considers the possibility that if, in the instant case, all, instead of just some, of the cargo that had been stowed in the after end of the hold had been discharged at Bridgeport prior to the vessel's arrival at Holt, and the strip of ice had formed on the deck of the 2 hold -- an event that was just as possible as the formation of the ice on the pipe that had not been discharged -- and petitioner slipped and fell on this ice, petitioner would be entitled to recover because the icy condition then would have been on what clearly was a work space of the vessel. The fact of the matter is that, in the realistic operation of vessels, and the manner in which cargo is stowed in vessels, cargo becomes part of the work space of the vessel. The *Derr* distinction between cargo and work space is the ultimate distinction without a difference.

Derr is in conflict with decisions from other Circuits.

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2. The panel of the Third Circuit which decided *Derr* recognized that its decision was in conflict with the Ninth Circuit's decision in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, *cert. denied*, 459 U.S. 967 (1982), see 835 F.2d at 494, and the Fifth Circuit in *Woods v. Sammisa Co., Ltd. and Sammiline Co., Ltd., et al*, 873 F.2d 842 (5th Cir.), *petition for rehearing and for rehearing in banc denied*, 878 F.2d 1435 (5th Cir. 1989), *cert. denied*, 107 L.Ed.2d 847 (1990), subsequently recognized the *Derr* was in conflict with its decisions prior decisions in *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), and *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), see 873 F.22 at 848, and the existence of this conflict was cited by three Justice of this Court in dissenting from the denial of the Petition for a Writ Of Certiorari which was filed in *Woods*, see *Sammiline Company, Ltd. et al. v. John Woods, et ux., et al., 110 S.Ct. 853, 107 L. Ed. 2d 847 (1990) (Dissenting Opinion).*

The instant case -- being based on *Derr* -- is in conflict with decisions from other Circuits. The Third Circuit -- and the District Courts in the Third Circuit -- are giving an expanded interpretation to *Derr*, thereby accentuating the conflict between courts in the Third Circuit and other courts over the extent to which the shipowner's duty of care extends to the condition of stowed cargo. It is clear from the decision in the instant case that this conflict will persist and grow until it is resolved by this Court. For this reason, it is respectfully submitted that a writ of certiorari should issue to resolve the conflict in circuits as to the shipowner's duty of care with respect to the condition of stowed cargo.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the Opinion and Judgment of the court below.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY PRINSKI	:	CIVIL ACTION
v.	:	
TERMAR NAVIGATION CO., INC. and VAN OMMEREN SHIPPING B.V.	:	NO. 89-6899

MEMORANDUM & ORDER

GAWTHROP, J.

Plaintiff, Gary Prinski, seeks recovery under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905 (b), for injuries he sustained while working aboard the M/V Serafin Topic, a cargo ship owned by defendant, Termar Navigation Company, Inc., and time chartered by defendant, Van Ommeren Shipping, B.V. The defendants have moved for summary judgment upon stipulated facts. For the reasons that follow I shall grant the motion.

BACKGROUND

Plaintiff, Gary Prinski, was injured on January 15, 1988, after slipping on a thin strip of ice, which had formed on top of a pile of black steel pipe stored in the # 2 hold of the cargo ship, M/V Serafin Topic. Mr. Prinski was in the hold as an employee of Holt Cargo Systems, a stevedore hired to unload cargo from the ship in the port of Camden. The ice strip was about one inch thick and was not readily visible at the time of the accident.

According to an expert hired by the plaintiff, the ice formed

from water that seeped from wet dunnage.[1] The ship, which was originally loaded in the Netherlands, stopped in Bridgeport, Connecticut, before berthing in Camden. The black pipe, upon which the ice formed, became exposed after beams and sheet piling, which had been stored above the black pipe, was unloaded in Bridgeport. The parties agree that the ice was formed by subfreezing air temperatures that existed before and during the ship's passage to New Jersey, and that the ice was present before cargo operations began in Camden. The parties also agree that the defendants had no actual knowledge of its existence.

The plaintiff argues that the defendants are liable for his injuries because they failed to inspect the cargo hold before Holt began offloading the cargo in Camden.[2] Plaintiff contends that had defendants properly inspected the cargo, they would have discovered the ice and the danger is presented, and they would have been required to remedy or warn about the condition. Defendants counter that they had no duty to inspect.

DISCUSSION

The question here is a narrow one. The Supreme Court has ruled that vessel owners have no duty to inspect or supervise stevedoring operations, and that they cannot be held liable for injuries to longshoremen resulting from dangerous conditions that develop during the loading or unloading of cargo. See Scindia Steam Nav. Co. v. De Los Santos, 451 U.S. 156, 172 (1981). The Third Circuit has held this rule to apply even if the dangerous conditions were created by the negligence of the on-loading stevedore, and the injury sustained by an employee of the off-

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1. Wooden boards placed between the layers of cargo for protection and ventilation.

2. Although the accident occurred in New Jersey, plaintiff is a resident of Pennsylvania and both defendants are incorporated in Pennsylvania, making this forum a proper venue for the action, under 28 U.S.C. § 1391(b).

loading stevedore. See Derr v. Kawasaki Kisen K.K., 835 F.2d 490 (3rd Cir. 1987). The question here is whether an exception to this rule may be found where the dangerous condition cannot be attributed to negligence of either the on-loading or off-loading stevedore.[3] On the basis of Scindia and Derr, I have no trouble holding that it may not.

Scindia was decided after a substantial change in the provisions of the Longshoremen's and Harbor Workers' Compensation Act. Before 1972, longshoremen injured at work could recover from a vessel owner on a theory of unseaworthiness simply by demonstrating that the injury was caused by an unsafe condition on the vessel. No proof of fault on the part of the shipowner was required. See Scindia 451 U.S. at 164-5. Amendments to the Act in 1972 abolished the unseaworthiness claim, leaving negligence as the only basis for shipowner liability. See 33 U.S.C. § 905(b). Against this statutory backdrop, the Supreme Court ruled that to hold the shipowner liable for dangerous conditions that develop during cargo operations--even on a theory of negligence--would require the shipowner to oversee the stevedore, a situation that would be inconsistent with the Congressional intent to eliminate liability without fault. See Scindia, 451 U.S. at 169. The Court thus stated that the shipowner "is entitled to rely on the stevedore" and is under "no duty to inspect or supervise cargo operations". 451 U.S. at 172 (Emphasis in original).

The Third Circuit expanded upon Scindia to hold that shipowners are also under no duty to inspect before stevedoring operations begin. See Derr, 835 F.2d at 494. In so doing, that court recognized that other circuits had ruled otherwise. See Derr, 835 F.2d at 494 (citing Stass v. American Commercial

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3. Defendants argue that this case falls directly under the Third Circuit's opinion in Derr because the accident can only be attributed to the on-loading stevedore's negligent use of soggy dunnage. Whether the on-loading stevedore was negligent would be a factual question for a jury. I decide the case on the assumption that the stevedore was not.

Lines, Inc., 720 F2d. 879, 882 (5th Cir. 1983); Clark v. Bothelho Shipping Corp., 784 F.2d 1563, 1565 (11th Cir. 1986). However, the Derr court agreed instead with the district court, which held that a duty upon the shipowner to inspect cargo conditions at each port would render the principle of fault-based liability a nullity. See Derr, 835 F.2d at 494 (citing Robertson v. Tokai Shosen K.K., 655 F.Supp. 152, 155 (E.D.Pa. 1987).

Plaintiff argues that Derr is distinguishable because it involved cases where foreign stevedores had been negligent in their loading of cargo. Here, plaintiff argues, the negligence of the foreign stevedore is not established. This is a distinction without a difference. The Derr holding was based on a determination of the duty of the shipowner. The court stated that the issue was not "where the cargo was loaded" but whether the vessel could be held liable for "failure to inspect or supervise [its] stowage". See 835 F.2d at 495. In answering in the negative, the Third Circuit held, in effect, that shipowners are never liable for conditions that occur as a result of cargo operations within the responsibility of the stevedores. See 835 F.2d at 497. Whether or not one of the stevedores involved in the stowing of cargo was at fault is immaterial to the scope of the shipowner's duty. Indeed, if shipowner liability were tied to a finding of negligence on the part of a stevedore, shipowners would always be under a duty to inspect and supervise at each port because they could never be certain that negligence would be found on the part of a stevedore. This is squarely contrary to Derr.

Plaintiff also argues that the defendants in this case may be held liable under an exception outlined in Scindia. While the Supreme Court held that vessel owners have no duty to inspect stevedoring operations, the court held that vessel owners owe a continuing duty of care with respect to the "ship's gear, equip-

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4. Derr was a consolidated appeal from Derr v. Kowaskaki Kisen K.K., No. 85-5250, ben op., App. at 106-109 (E.D.Pa. Dec. 2, 1986); and Robertson, 655 F.Supp. at 152.

ment, tools, and work space to be used in the stevedoring operations". See Scindia, 451 U.S. at 167. According to the Court, a shipowner who becomes aware of a defect in ship's "gear, equipment, tools or work space" during stevedoring operations, or who is aware or should be aware of the defect before stevedoring operations begin, owes a continuing duty of care to intervene to remedy the defect. See Scindia, 451 U.S. at 176, 178.

Plaintiff argues that the ice on the black steel piping in the # 2 hold of the M/V Serafin Topic was a dangerous condition in the ship's work space, of which the defendants should have known and for which they may be held liable. However, the Third Circuit in Derr held that the Supreme Court's reference to "work space" was not intended to include stowed cargo. See Derr, 835 F.2d at 495. To hold otherwise would reintroduce the duty to inspect cargo, a duty that is expressly rejected elsewhere in the Scindia opinion. See Derr, at 495-496.

The Derr opinion also suggests that there may be a duty to warn of improper stowage, Scindia notwithstanding, if the ship has actual knowledge of the danger and the danger is not open and obvious to the stevedore. See Derr, 835 F.2d at 496. Without deciding whether the ice hazard here was open and obvious, it is clear from the parties' stipulation that the defendants did not have actual knowledge of the danger.

There being no basis under the law upon which plaintiff may recover on its claim, defendants are entitled to judgment. See Fed.R.Civ.P. 56(c). An order follows.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY PRINSKI	:	CIVIL ACTION
v.	:	
TERMAR NAVIGATION CO., INC.	:	
and	:	
VAN OMMEREN SHIPPING B.V.	:	NO. 89-6899

ORDER

AND NOW, this 25th day of February, 1991, upon consideration of defendants' Motion for Summary Judgment, and plaintiff's Answer thereto, it is hereby ORDERED that the motion is GRANTED, and the complaint brought by plaintiff is DISMISSED with prejudice.

BY THE COURT,

/S/ Robert S. Gawthrop, III
Robert S. Gawthrop, III, J.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY PRINSKI	:	CIVIL ACTION
v.	:	
TERMAR NAVIGATION CO., INC. and VAN OMMEREN SHIPPING B.V.	:	NO. 89-6899

ORDER AMENDING OPINION

GAWTHROP, J.

AND NOW, this 21st day of March, 1991, this Court's Memorandum Opinion filed on February 25, 1991, is amended as follows:

1. On page 1, second line from the bottom, the word "thick" is replaced by the word "wide".

2. On page 2, footnote 2, which reads:

> 2. Altnough the accident occurred in New Jersey, plaintiff is a resident of Pennsylvania and both defendants are incorporated in Pennsylvania, making this forum a proper venue for the action, under 28 U.S.C. § 1391(b).

is replaced with a new footnote 2, which reads:

> 2. Since the accident occurred in New Jersey, and neither defendant is incorporated in or has its principal place of business in Pennsylvania, this forum is not a proper venue for the action, which

is based upon federal law, despite plaintiff's residence here. See 28 U.S.C. § 1391(b). However, any objection based on improper venue has been waived under Fed.R.Civ.P. 12(h)(1).

BY THE COURT,

/S/ Robert S. Gawthrop, III
Robert S. Gawthrop, III, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1225

GARY PRINSKI,

Appellant

vs.

TERMAR NAVIGATION CO., INC., and
VAN OMMEREN SHIPPING B.V.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 89-06899)
District Judge: Honorable Robert S. Gawthrop, III

Submitted Under Third Circuit Rule 12(6)
August 5, 1991
Before: MANSMANN and ALITO, Circuit Judges,
and DIAMOND, District Judge.*

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

* Honorable Gustave Diamond of the United States District Court for the western District of Pennsylvania, sitting by designation.

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/S/ Carol Los Mansmann
Circuit Judge

Attest

Sally Mrvos
Sally Mrvos, Clerk
AUG 12, 1991

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY PRINSKI	:	CIVIL ACTION
v.	:	
TERMAR NAVIGATION CO., INC. and VAN OMMEREN SHIPPING B.V.	:	NO. 89-6899

STIPULATION

The parties agree that if the within case were to be tried there would be evidence to support the following findings:

1. On January 15, 1988, Plaintiff, Gary Prinski, was employed as a longshoreman by Holt Cargo Systems, a stevedore with terminal facilities located in Gloucester, New Jersey. On that day Holt Cargo Systems had been hired to discharge a cargo of steel products from the M/V SERAFIN TOPIC, a cargo ship which, at the time, was owned by Defendant, Termar Navigation Co., Inc., and under time charter to Defendant, Van Ommeren Shipping B.V.

2. Plaintiff Prinski was a member of a longshore gang, of which James Phillips was the gang boss. The Phillips' gang was assigned to discharge the cargo that was in the No. 2 hold of the M/V SERAFIN TOPIC.

3. In December, 1987, the vessel had loaded steel products at Antwerp and Ijmuiden, two ports in the Netherlands, and sailed for Bridgeport, Connecticut, where it arrived and remained at an anchorage from January 7 through January 11, 1988. It then berthed and discharged cargo from all five holds on January

12 and 13, finishing shortly before midnight on the 13th. The vessel closed hatches and sailed immediately for Camden and arrived at berth there shortly before midnight on the 14th. On the morning of the 15th hatches were opened and five Holt gangs commenced discharging from all holds at 0800.

4. The vessel's cargo had been loaded and stowed overseas by independent contractor stevedores. The discharge at Bridgeport was conducted by an independent contractor stevedore and Holt, at Camden, acted in a similar capacity. Each of the Holt longshore gangs had its own foreman, or gang boss. There were also two head foreman or "ship bosses" and a stevedore supervisor assigned to the vessel by Holt.

5. Although the vessel encountered gale-force winds and heavy seas and was shipping solid water over its deck and hatches throughout most of the Atlantic crossing, air temperatures remained above freezing until January 6, 1988, the day before its Bridgeport arrival. Air temperatures then dipped below freezing throughout the time the vessel was at anchor at Bridgeport as well as during the coastwise trip to Camden on January 14. A record of air temperatures was not maintained aboard the vessel during periods that it was at berth, but Philadelphia area weather records show that the temperature remained below freezing on the 12th and during most of the 13th and well below freezing throughout the 14th and 15th. The severity of sea conditions during the Atlantic crossing had prevented vessel personnel from either entering or ventilating the cargo compartments.

6. At the time of the vessel's arrival at Camden the forward half of the No. 2 hold was stowed with hot rolled and palletized steel coils which were to be discharged at Camden.

7. The after half of the hold was stowed with structural steel (beams of various lengths and widths). The beams were to be discharged at Wilmington, North Carolina, the vessel's next port. On top of the beams there were two layers of black seamless steel tubing (pipe). The pipe consisted on random lengths with an outside diameter between 5" and 16.5", but most of the pipe was

of diameters ranging between 12" and 15". The pipe was stowed in a fore and aft direction with single and double pieces of approximately 1" thick dunnage boards placed between each tier. The stow of structurals topped by the pipe in the after half of the hold was somewhat higher than the stow of coils in the forward end.

8. When the vessel arrived at its previous port, Bridgeport, there had been a considerable amount of other cargo stowed above the pipe. Directly above the pipe there had been a stow of wide flange beams and sheet piling stacked between three and six tiers high in different areas. Above these there was a shipment of bundles of special sections four tiers high. On top of the foregoing, centered on the stow, there were, arranged in rows, 49 steel coils on wooden skids. Thus, the pipe which was deep within the after stow during the voyage, became exposed to view upon completion of the discharge at Bridgeport. The pipe was also to be discharged at Camden.

9. Holt, the stevedore at Camden, elected to discharge the coils in the forward end first and then, the pipe in the after end. The hold workers had a spelling arrangement according to which three men would work and three would be on standby elsewhere and these groups would relieve one another either every hour or every two hours. Plaintiff could not be certain which. He believed, however, that he had worked between 0800 and 1000 and again between 1300 and 1500.

10. Plaintiff and his fellow workers entered and left the No. 2 hold by means of a permanent ship's ladder located at the after end of the hold. The hold was approximately 90 feet square. In entering the hold the men would step off the hatch ladder onto the pipe and walk along the pipe to its forward end where they would climb down to the coil stow. In leaving they would retrace their steps to gain access to the ladder.

11. Plaintiff was injured shortly after 3:00 p.m. while in the course of leaving the hold. He was walking across the pipe to the ladder when he slipped and fell, sustaining the injuries for which

this suit has been brought. After falling, Plaintiff discovered that the cause of his fall was ice on a pipe. There appeared to be a discontinuous strip of ice affecting 10 or 11 of 12 adjacent pipes. The strip was approximately 1" wide and laid in a thwartship direction. Plaintiff testified that the strip of ice was thin. It could be seen if one was looking for it as he stood on the pipe, but was not readily apparent to him as he walked across the pipe. The ice, which appeared to cover only a narrow segment of the upper surface of the pipes as they laid in the stow, was photographed by the Plaintiff on the day following his accident. The strip can also be detected in one of many photographs taken by the cargo surveyor who was engaged to determine the possible existence of any damage to the cargo and, if so, its nature and origin. The surveyor had taken the particular photograph simply to show the arrangement of the pipe stow and had not noticed or mentioned in his report the presence of any ice on the pipe or anywhere else in any of the vessel's holds. He did note in other portions of his report that puddles of water were found in several holds which proved to be sea water; that some of the exposed products and their waste metal coverings showed superficial rusting from condensation; and that rust caused by the dripping of seawater from around the edges of hatch openings had in places caused lines of rust on products stowed uppermost and directly beneath these openings.

12. It is the opinion of an expert retained on behalf of Plaintiff, said opinion being derived from observing the photographs, and reviewing the vessel's stowage plan, the survey reports, and Plaintiff's deposition testimony, that the strip of ice came about as a result of water being squeezed from a piece of wet dunnage that had been on top of the pipe, which water then froze. The weight of the cargo which had been stowed on top of the pipe and which had been discharged in Bridgeport, would have been sufficient to squeeze water out of a piece of wood dunnage if the dunnage had been wet, which water might have frozen if the temperature was sufficiently low. This would explain the presence of the ice in a narrow strip running across a portion of the pipe stow. It assumes that although the entire stow with dunnage was in lace during a 14-day Atlantic crossing when tem-

peratures were above freezing, sufficient moisture remained in the piece of dunnage to be expelled from it and freeze thereafter during the sub-freezing weather which commenced during the night of January 6. This explanation, if correct, would support a finding that a strip of ice was present on the pipe at the start of the cargo operations in the No. 2 hold of the vessel on January 15, 1988. At any rate, since no other remotely plausible explanation has been found and Plaintiff has testified that the strip did consist of ice, the parties have agreed that it was ice and that it was present when the work began at 0800 on January 15, 1988.

13. There is no evidence that either of the Defendants had actual knowledge of a wet dunnage board having been used in the stow or of the existence of ice such as has been described by Plaintiff on the pipe in the stow aboard the vessel which was destined for Camden discharge.

FREEDMAN AND LORRY, P.C.

BY: _____
Charles Sovel
Attorneys for Plaintiff

KRUSEN EVANS AND BYRNE

BY: _____
T. J. Mahoney
Attorneys for Defendants

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972

HOUSE REPORT NO. 92-1441

(as reported at 1972 U.S. Code Cong. and Adm. News beginning at page 4698)

* * *

[4701]

Elimination of Unseaworthiness Remedy

One of the most controversial and difficult issues which the Committee has been required to resolve in connection with this bill concerns the liability of vessels, as third parties, to pay damages to long-

[4702]

shoremen who are injured while engaged in stevedoring operations. The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with *Seas Shipping Co. v. Sieracki*, 328 U.S. 25 (1946) which held that the traditional seamen's remedy based on the breach of the

vessel's absolute, nondelegable duty to provide a seaworthy vessel was also available to longshoremen and others who performed work on the vessel which by tradition has been performed by seamen. Under the *Sieracki* case, vessels are liable, as third parties, for injuries suffered by longshoremen as a result of "unseaworthy" conditions even though the unseaworthiness was caused, created, or brought into play by the stevedore (or an employee of the stevedore) rather than the vessel or any member of its crew. For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it. Furthermore, in the example given above, under the Supreme Court's decision in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the vessel may recover the damages for which it is liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore has breached an express or implied warranty of workmanlike performance to the vessel. The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine.

The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were not being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. The Committee also heard testimony

[4703]

that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committee's attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving injured longshoremen on the backlog of personal injury cases in that court.

The Committee also has taken note of the inescapable fact that the controversy over third party claims by longshoremen has had political ramifications which have resulted in forestalling any improvements in the present Act for over twelve years.

The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.

Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-

based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.

Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act, *Crumedy v. The J. H. Fisser*, 358 U.S. 423, *Albanese v. Matts*, 382 U.S. 283, *Skibinski v. Waterman SS Corp.*, 330 F.2d 539; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, *A. N. G. Stevedores v. Ellerman Lines*, 369 U.S. 355, *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, *Alaska SS Co. v. Peterson*, 347 U.S. 396, *Italia*

[4704]

Societa v. Oregon Stevedoring Co., 376 U.S. 315, or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence.

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation -- just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position *vis a vis* his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.

Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.

[4705]

Under the proposed amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages.

The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in differ-

ent ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption to risk" in an action by an injured employee shall also be applicable.

Finally, the Committee wishes to emphasize that nothing in this bill is intended to relieve any vessels or any other persons from their obligations and duties under the Occupational Safety and Health Act of 1970. The Committee recognizes that progress has been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations. The Committee expects to see further progress in reducing injuries and stands ready to immediately reexamine the whole third party suit question if it appears that the changes made in present law by this bill have affected progress in improving occupational health and safety.